IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.2288 of 1998
WITH
SPECIAL CIVIL APPLICATION No.2370 of 1996
WITH
SPECIAL CIVIL APPLICATION No.5722 of 1996
WITH
SPECIAL CIVIL APPLICATION No.8242 of 1998
WITH
SPECIAL CIVIL APPLICATION No.7847 of 1998
WITH
SPECIAL CIVIL APPLICATION No.7848 of 1998
WITH
SPECIAL CIVIL APPLICATION No.7860 of 1998
WITH
SPECIAL CIVIL APPLICATION No.7862 of 1998
WITH
SPECIAL CIVIL APPLICATION No.10678 of 1996
WITH
SPECIAL CIVIL APPLICATION No.8343 of 1996
WITH
SPECIAL CIVIL APPLICATION No.8344 of 1996
WITH
SPECIAL CIVIL APPLICATION No.7380 of 1997
WITH
SPECIAL CIVIL APPLICATION No.7384 of 1997
WITH
SPECIAL CIVIL APPLICATION No.8423 of 1998
WITH
SPECIAL CIVIL APPLICATION No.10930 of 1998
WITH
SPECIAL CIVIL APPLICATION No.2366 of 1996

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SHREE VIDHYA VIKAS MANDAL & 51 - Petitioner(s)

Versus

STATE OF GUJARAT & 6 - Respondent(s)

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Appearance :
MR JAYRAJSINH CHAUHAN for MR MUKUND M DESAI for Petitioner(s) : 1-2
MS ARCHNA C RAWAL with MR PRASHANT D MANKAD, AGPs for Respondent(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 04/12/2006

COMMON ORAL JUDGMENT

(1) This petition prays for following reliefs:

> "21. The petitioners, therefore, pray that this Hon'ble Court may be pleased to:-
>
> A) admit this Special Civil Application.
>
> B) issue a writ in the nature of mandamus and/or any other appropriate writ, order or direction against the respondents declaring the Government Resolutions dated 21.05.1994 and 21.12.1994 as unconstitutional, illegal and quash and set aside the same by issuing a writ, order or direction.
>
> C) pending the admission, hearing and final disposal of this Special Civil Application the operation, execution and implementation of Government Resolutions dated 21.5.1994 and 21.12.1994 at Annexure "D" (collectively) be stayed and the respondents be directed not to implement the provisions of the said Government Resolutions.
>
> D) Pending the admission, hearing and final disposal of this Special Civil Application, the operation, execution and implementation of the order dated 11.11.1997 passed by the District Education Officer, Mehsana be stayed and respondents be restrained from taking

any penal measures including that of deduction in grant,

E) grant such other and further orders as are deemed proper."

(2) The petition has been heard along with the group of matters involving similar issue and hence, Mr.H.J.Nanavati and Mr.B.S. Patel, learned advocates, were permitted to address the Court as interveners in light of the pendency of similar matters wherein they represent the petitioners.

(3) The petitioner No.1 is a Public Trust running a secondary school in the name of 'Sitaba J.V. Patel Kanya Vidhyalaya' at Sundhiya, Taluka Kheralu, Dist. Mehsana and the petition has been filed by the General Secretary of petitioner No.1-Trust.

(4) The learned advocate Mr.Jayrajsinh Chauhan, appearing on behalf of the petitioners, has submitted that the following questions of law arise for determination:

(a) Whether the Gujarat Secondary Education Act empowers the District Education Officer to pass order of appointment to surplus teacher to different schools.

(b) Whether any such appointment not made in accordance with Section 35 of the Act would be void as per the provisions of Section 35(7) of the Gujarat Secondary Education Act, 1972.

(c) Whether the District Education Officer has power or authority to appoint anyone in contravention of provisions of Sections 34 and 35 of the Act.

(d) Whether the provisions incorporated in Government Resolution dated 21.5.1994 whereby the District Education Officer is vested with power to cancel the recognition of the school for non-compliance of his order ?

(e) Whether such provisions of the Government Resolutions dated 21.5.1994 and 21.12.1994 are in contravention of Section 31 of the Gujarat Secondary Education Act and Regulations 9 and 9-A or Gujarat Secondary Regulations, 1974 ?

(5) The two circulars dated 21.05.1994 and 21.12.1994, which are under challenge, have been translated and read as under:

> "Regarding giving the protection to the surplus teachers/employees of Non Government Secondary and Higher Secondary Schools.
>
> GOVERNMENT OF GUJARAT
> Education Department
> Resoultion No UMSH-1293-2533-G-1
> Sachivalaya Gandhinagar
> Date : 21-05-1994

Read:

1. Govt Resolution No BMSH-1382-816-83-G dtd 11- 01-1983 of the Education Department.

2. Govt Resoultion No UMSH-1286-61806-G-1 dtd 13-02-1990 of the Education Department of the Govt.

3. Resolution No UMB-1292-641-G-1 dtd 10-07-1992 of the Education Department of the Court.

4. Letter No BMSH-MA-1-Fajal-93-94-12-284-85 dtd 30-10-1993 of the Higher Edu Commissioner State of Gujarat, Gandhinagar.

P R E A M B L E

Some schools out of Non Govt Secondary Schools and Higher Secondary Schools situated in the State remain closed for want of students. Similarly, the situation of closure of class arises in some schools. As a result of which, the question of inclusion of surplus Secondary as well as Higher Secondary Teachers/employees of the schools going to be closed arises. Many times the teachers/employees at some extent cannot be included for long time. For that reason, the salary is required to be paid to such teachers/employees sitting at home for the reason of pay protection having been given to them and in this way, unnecessary economic burden is being suffered by the Government. However the Government by passing orders from time to time has continued the policy of giving protection to such surplus teachers/employees. Reconsidering the facts as to the present policy regarding the pay protection of surplus teachers/employees, (as it appeared very much necessary to do accordingly, at the end to large discussion in a meeting in presence of the Hon'ble Chief Minister with the office bearers of Gujarat Secondary Teachers Union on 13-4-94) it has been resolved

to frame a new policy in respect of the present protection being given to surplus teachers/employees.

R E S O L U T I O N

At the end of careful consideration, it is hereby resolved to implement the present policy as mentioned below instead of the present policy of protection being given to surplus secondary teachers or higher secondary teachers/employees.

1. The protection of surplus shall be given to the secondary teachers or higher secondary teachers/employees having been appointed w.e.f. 15-04-1994 or prior to that, who have completed minimum one year service i.e. 365 days service. The protection of surplus shall not be given to teachers/employees having been appointed w.e.f. 16-4-94 or thereafter.

2. No kind of protection as any surplus teachers/employees shall be given to those having been appointed w.e.f 16-04-1994 or thereafter. But such surplus teachers/employees shall be discharged giving remuneration as per the provision of Rule 33 of the Gujarat Secondary Education Rules, 1972. No kind of grant shall be given to schools regarding paying the remuneration at the time of discharging such teachers/employees and the school shall have to pay the remuneration from its own fund. The amount of remuneration shall be cut off from the maintenance grant of the school failing in making payment of remuneration to the teachers/employees. The District Education Officer shall take lawful action against the school failing in making payment in this way.

3. The clear interpretation shall have to be made with regard to closing the protection of surplus teachers/employees means discharging from service.

4. If the teachers/employees having been appointed upto 15-04-1994, whose one year service is completed on that day, shall have to be discharged on arising of circumstances, then the protection of surplus shall be given to them in accordance with the provisions as under :

A) The school from which such surplus teacher/employee is not discharged should not have closed within five(5) years from commencement.

B) The school in which a teacher/employee becomes surplus for the reason of closure of a class, shall not be given new class upto five years after closure of such class under any circumstances.

C) The order of the District Education Officer shall be considered final in respect of inclusion of surplus teachers/employees and if the concerned teacher/employee would not go to the place allotted to him, he shall be discharged from service and thereafter even if their service is of those much years, they shall be discharged giving remuneration as per the provision of Rule 33 of The Gujarat Secondary Education Rules, 1972.

D) Even if the Government Resolutions or circulars are mentioned at any place, the male employee shall be allotted in female school, if there is no vacancy in relevant school, in any other school and the female school shall have to accept him.

E) In the cases, where the institute does not resume the allotted the teacher/employee the expenditure required to be paid to such employee for the period without work, shall be deducted from the maintenance grant payable to institute. If the maintenance grant being similar to the pay of the assistant teacher is not admissible to the

school, then the District Education Officer shall take the action for the cancellation of registration of such school.

F) Whatever provision having been made earlier in respect of giving alternate with regard to the choice of a station, regarding inclusion of surplus teacher/employee is hereby cancelled.

G) The teachers/employees becoming surplus from the school being run by the Institutes formed on the basis of linguistic or religious minority shall be included in other minority schools or other schools. In alternate, following procedure as per rules, they shall be discharged giving remuneration as per Rule 33.

H) A teacher/employee who is given the protection of surplus, shall be included first of all in concern district or in the school of a district nearby and if no vacancy is there accordingly, he shall be included in a school of any district of the State and it will be compulsory for him to go there.

I) The post of non-academic employee is based on the total strength of the students as per the present rules. But the specific posts such as librarian, research teacher, laboratory assistant cum peon are being created taking the physical facilities and the number of classes into consideration. If the employees working on all the said posts have to be made surplus in any way, then the rules as stated herein above shall have to be made applicable.

J) On the occasion of filling up the post of academic/non-academic employee, if the relevant post is to be filled up by the candidate of reservation category as per roster point and the surplus academic/non academic employee of relevant subject is available with the District Education Officer,

then in such circumstances, the relevant post shall be filled up by the available surplus teacher/employee and the roster point shall have to be carried forward.

K) If vacancy takes place in school and the surplus teacher/employee has been allotted to such school, then 'No objection Certificate' should be given for the new posts becoming vacant. If No Objection certificate for the immediate previous post fallen vacant has come and the surplus teacher of relevant subject is available, then the allotment of surplus teacher shall be made. If the posts more than one becomes vacant simultaneously in the school and the surplus teacher is available than this extent shall be kept as 1:1 to allot it the surplus teacher of relevant subject.

L) During the period the grantable Secondary/ Higher Secondary school going to be started as new takes time to be grantable in context with the policy of grant, shall compulsorily have to accept the surplus teacher/employee being available in the office of the District Education Officer and only pay expense of such teachers shall have to be given in form of grant to such schools.

By the order and in the name of Governor of Gujarat.

D. C. Vora
Dy. Secretary
Education Department

Copy to :

* Personal Secretary/Assistant to the Chief Minister and Ministers.
* Higher Education Commissioner
State of Gujarat, Gandhingar.
* Secretary
Gujarat Secondary Education Board,
Gandhingar.

* Joint Education Director
(10+2 special pattern),
Capital Project Bhavan, Ellisbridge,
Ahmedabad.
* All District Education Officers
* Registrars,
Secondary School Service Tribunal,
Ahmedabad.
* Registrar,
Gujarat Affiliated Colleges Services Tribunal,
Ahmedabad.
* All Branches of Dept.
* Special File”

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the Surplus teachers/employees of non-government secondary and higher secondary School
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for giving protection to .....

Government of Gujarat,
Education Department,
Resolution No. : UMSh-1293-2533/G.
Sachivalaya, Gandhinagar.
Date : 21/12/1994.

Read:

1. Government Education Dept. resolution No.: UMSh-1293-2533/G. Dated 21-5-1994

2. Higher Education Commissioner, Gujarat State, Gandhinagar letter no. : BMSh-M : 1/Gh/94-95/13071 dated 6-10-94.

P R E A M B L E

A new policy for giving protection to the surplus teachers/employees of non-government secondary and higher secondary school had been formed vide resolution dated 21-5-1994 at above reference - (1). In connection with the said policy, as it was decided in the meeting held in the chairmanship of the Hon'ble Dy. Chief Minister

(Education) with Gujarat State Higher Secondary Teachers' Association on Dt. 29/9/1994, it was under active consideration of the Government as to whether the teachers/employees who are entitled to be given protection of surplus as per resolution Dt. 21/5/1994, can be given protection of surplus or not if they change school only once during the rest of their entire service.

R E S O L U T I O N

After careful consideration, in view of the new policy formed vide resolution Dt. 21/5/1994 at above reference (1), it is hereby resolved that protection of surplus to the teachers/employees of non-government secondary and higher secondary schools, who are entitled to be given protection of surplus, may be continued for those teachers/employees who change school only once during the rest of their entire service, on the following conditions :

1. In accordance with the resolution No.:Umsh-1293-2533/G dated 21/5/94 at above reference (1), the appointment to the concerned teachers/employees should have been given on or before dt. 15/4/93, meaning thereby he/she should be entitled to be given protection of surplus.

2. The teacher/employee concerned with the above (1), who is willing to change school, he shall have to take prior permission of the Higher Education Commissioner through concerned District Education Officer.

3. A school principal shall have to make note of such permission in service book of such teacher/employee who has been given permission to change a school and the concerned District Education Officer shall have to certify the said note and a certificate permitting such teacher/employee to change school be issued by the Higher

Education Commissioner and the said certificate shall be stuck in the service book of the concerned teacher/employee.

4. If any teacher/employee will change school without permission of the Higher Education Commissioner, he shall not be entitled to the protection of surplus teacher/employee even if his appointment date may be on or before date 15/4/93.

5. If any teacher/employee, who would not have been entitled to be given protection of surplus, joins a new school without prior permission of the Higher Education Commissioner, his pay or pay-scale may not be entitled to be protected and his service prior to the new appointment may not be considered under the Government Higher Pay Scale Scheme.

By order and in name of the Governor of Gujarat.

Sd/- illegible

(Ashwin Bhavsar)
Section Officer,
Education Deptt.

To :

The Hon'ble Chief Mininster/Education Minister &
The Personal Secretary/Assistant to the other Ministers, Sachivalaya, Gandhinagar.

Higher Education Commissioner, State of Gujarat, Gandhinagar.

The Secretary, Gujarat Secondary Education Board, Gandhinagar.

Joint Education Director(10+2 Special Pattern)
Patnagar Yojana Bhavan, Ellisbridge,
Ahmedabad.

All District Education Officers

Registrar, Secondary School Services Tribunal, Ahmedabad.

Registrar, Gujarat affiliated College, Services Tribunal, Ahmedabad.

All Branches of Department

Select File/ ancillary Select File."

(6) According to the petitioners, by virtue of provisions of Sections 31, 34 and 35 of the Gujarat Secondary Education Act, 1972 (the Act) every school is entitled to recruit teachers and head master in accordance with the statutory scheme laid down by the aforesaid provisions. That once the appointment of the teachers and the head master is by virtue of the committee to be constituted as provided under the statute, the District Education Officer (DEO) has no powers and cannot insist on composition of the committee. As a natural corollary he has no powers to appoint and/or allocate teachers. That in absence of any such powers every school must be permitted to appoint teachers by virtue of its own procedure laid down in the form of committee considering the standard of education to be imparted by a particular school. That neither the DEO

nor the State authorities are entitled to appoint/allocate any such teacher who is rendered surplus because either a class or classes in a particular school are closed down because of diverse circumstances, or where the teachers are rendered surplus because the entire school is closed down. That the problem has principally arisen because the education department has come across certain schools which are only paper entities. In other words, such schools only exist on paper and in fact do not have either any building, or infrastructure, or students and hence, there is no education being imparted as such. That under the guise of protecting the services of such teachers the DEO should not be permitted to exercise collateral powers of appointing such teachers to the existing schools which have achieved certain educational standard by foisting upon them sub-standard teachers.

(7) It was also contended that there have been instances when a vacancy in a particular school is in relation to a particular subject e.g. mathematics and the DEO allots a surplus teacher who is not a teacher for

mathematics but a teacher for languages. Such instances were cited to highlight the grievance of the petitioners. A further submission was made based on the Apex Court decision in the case of *T.M.A. Pai Foundation & Ors. Vs. State of Karnataka & Ors.*, (2002) 8 SCC 481 to submit that under Article 19(1)(g) of the Constitution of India every person has an unfettered right to set up an educational institution and such right cannot be curtailed by a government resolution. That merely because the State Government disburses monetory grant by virtue of the grant-in-aid code, the government does not get any right per se to dictate terms in appointment of teachers contrary to the statutory provisions. That in fact the grant-in-aid code is only a form of executive instructions and cannot take place of a statutory provision.

(8) Referring to the impugned circulars, a submission was made that the said circulars have been issued, as recorded in the circulars itself, after consultation with the office-bearers of the Gujarat Secondary Teachers' Federation but the management of the schools which is vitally affected with the running of the schools was

never consulted. In the circumstances, even if the circulars are required to be upheld as laying down a policy decision, it was necessary that before the said circulars are implemented qua a particular school, the management of such a school should be granted a choice to select a teacher out of the panel of surplus teachers prepared by the DEO. That this was necessary considering the fact that it was the primary duty of the management of a school to achieve and maintain certain standard of education.

(9) On behalf of the respondent authorities, the learned Additional Government Pleader has placed reliance on the following decisions of this Court:

(i) Chairman, Dhareshwar Sarvajanik Kelvani Trust & Anr. Vs. District Education Officer & Anr., 1997(2) G.L.H. 21; AND

(ii) Atladara Kelavani Mandal & Ors. Vs. State of Gujarat, 2004(1) GLR 244.

It was, therefore, urged that the issue has already been decided by this Court and it has been categorically held that the direction to absorb a surplus teacher in a school which has a vacancy and which has opted to run on grant cannot be termed to

be either unjust or arbitrary. That the appointment contemplated under Section 35(1) of the Act is a fresh appointment and cannot be equated with absorption of teachers rendered surplus due to closure of classes and/or class. Lastly, it was submitted that though the concept of consultation is alien in the circumstances, in practice, as far as possible, the concerned DEO makes an attempt to ensure that a surplus teacher is allotted to a school after making prior consultation. It was, therefore, urged that the petitions do not merit acceptance and deserve to be rejected.

(10) Before adverting to the principles enunciated by the decisions it is necessary to take note of the fact that one of the contentions raised was that the DEO has no powers to direct the management of a school to absorb a teacher or teachers declared to be surplus in light of the fact that right from the point of time of registration of a school as provided under Section 31 of the Act, it is the Secondary Board which is all in all.

(11) The contention is required to be stated to be rejected. This contention looses sight of the fact that under

Section 21 of the Act the State Government is empowered to appoint such other officers and servants as may be required to enable the Board to discharge its functions under the Act. In exercise of such powers read with clause (vii) of Regulation 2 of the Secondary Education Regulations, 1974 (the Regulations) the State Government has appointed every District Education Officer to be an officer of the Board to discharge the functions of the Board under the Act and the Regulations in the District for which such DEO is appointed. This has been done by notification dated 08.10.1974 published in Gazette on 31.10.1974. This has to be noted in context of the definition of “officer” as given in Regulation 2 (vii) of the Regulations. Therefore, to state that the DEO is a rank outsider in the present controversy cannot be accepted.

(12) It is true that the State Government cannot issue directions to appoint a teacher or headmaster, but from that it is not possible to accept the contention that a teacher already appointed and rendered surplus because of diverse reasons, cannot be permitted to be

absorbed in existing vacancy or a vacancy that arises subsequently. In the case of *Chairman, Dhareshwar Sarvajanik Kelvani Trust & Anr*. (supra) this Court has stated thus:

> *"2. ..... There is absolutely no substance in this contention. The appointment which is contemplated under Section 35(1) is a fresh appointment and it is not an absorption of teachers who are declared surplus due to closure of classes. The petitioner which is a grant-in-aid school is required to follow the directives under the Resolution dated 21.5.1994 issued by the Government under the provisions of Ss. 48 and 58 of the said Act and other enabling provisions. The direction to absorb a surplus teacher in a school which requires a teacher and which has opted to run on grant cannot be said to be unjust or arbitrary. If at all it would be very just arrangement to ensure that teachers, who have been declared surplus for no fault of theirs and only because of closure, are absorbed in other schools where teachers are needed. The challenge against the impugned Resolution cannot therefore be sustained. It was also submitted that the Resolution does not provide for consultation with the school concerned before a teacher is allotted to such school. In the context of things, it would be impossible to enforce such allotment if it is to depend on the consent of the school concerned. The grant-in-aid school which needs a teacher is allotted a teacher who is declared surplus by the District Education Officer and in such a situation there would be no need to consult the school concerned. Absence of such consultation cannot be in any manner treated as violation of any principles of natural justice inasmuch as the salary of a teacher is paid by the State and while allotting a surplus teacher to a school wanting a*

teacher, no decision adverse to the school is taken which may require a hearing to be given The petition is therefore without any substance and is rejected. ....."

(13) Once again in the case of Atladara Kelavani Mandal & Ors. (supra) this Court was called upon to deal with a similar contention, primarily in context of a minority institution, but after considering various decisions, it has been observed thus:

*"**19**. The contention raised on behalf of the petitioners that the orders passed by the DEO based on Clause-64.3 of the Code are in violation of the statutory provisions, deserves scrutiny. It is true that as per Chapter-VI of the Act, there are various provisions relating to services in registered private secondary schools and as provided under Section-35, selection or appointment of the staff is to be regulated in the manner, as provided, by the Committee. Therefore, the contention canvassed on behalf of the petitioners is that there is no provision under the Act providing for absorption of surplus teacher, who is appointed in a different school by a different management. Similarly, it was also sought to be canvassed on behalf of the petitioners that if such surplus teachers are absorbed by the institution, it creates the relationship of employer and employee between the person concerned and the management, which cannot be fastened unless there is any authority on the part of the State. Prima facie, such contention appears to be attractive but, on a close scrutiny, it appears that if a school or an institution is to run without availability of the grant-in-aid facility, then, in that case, it would be within*

their right to contend that no such surplus staff or teacher can be ordered to be absorbed. As observed earlier, there is no compulsion to receive the grant-in-aid. If the institution is desirous to receive the grant-in-aid from the State, it has to abide by the terms and conditions of the Code, but, the provisions of the Code or insertion of any clause in the Code cannot be assailed on the ground that it violates the statutory provision of Section-35. Even otherwise also, the provisions of Section-35 providing for selection and appointment of staff would be applicable in a case where fresh appointments are to be made. Absorption of teachers, who are otherwise selected by regular selection process in different schools, cannot be said to be, as such, the fresh appointees, as envisaged under Section-35 of the Act. The question, which arises in these petitions, is not that whether the authority can fasten or compel the institution to absorb the other teacher appointed by different school in its own school, but, in my view, the question is if the school is desirous to continue with the grant-in-aid facility and if the Government, with a view to reduce the financial burden upon the public exchequer, has formulated the policy of accommodation and absorption of such surplus teachers or staff in other schools, can such action be maintained or not. Therefore, on close scrutiny of the aforesaid submission, it appears that various provisions of Sections 34 to 36 of the Act, including those regulating the service in registered private secondary school, are of no help to the petitioners in assailing the action of the State Government for insertion of Clause-64.3 of the Code. The said contention is, therefore also, ultimately found to be of no substance.

***20**. The other contention raised on behalf of the petitioners that the clause leaving all powers to the DEO and the State to direct for absorption, irrespective of the qualification*

of the teachers, without there being any choice to the management, is violative of Article-14 of the Constitution of India, deserves consideration. It appears that the State, even while formulating the policy, may be in the matter of providing of the grant-in-aid or regulating such grant-in-aid, cannot act arbitrarily. It would be the duty of the State to ensure that quality of education is maintained and an absurd situation is not created, which basically frustrates and seriously damages the purpose of the education. Therefore, the State, while framing such policy, has to keep in mind that the quality of education is not disturbed or that appropriate norms providing for qualification of the concerned teacher or the staff are maintained. If the matter is examined accordingly, it is true that as per the petitioners, certain persons, who are not qualified for the post are ordered to be absorbed. For example, vacancy is of a teacher in `A' subject whereas the person posted is a teacher in `B' subject. There are also certain cases in this group of petitions where unqualified persons are posted over the post. Such a situation, in my view, can never be said to be intended by the State even while inserting Clause-64.3 in the Code. On a true and correct interpretation of Clause-64.3 of the Code, it appears that the DEO, while directing for absorption of the surplus staff, has to bear in mind the qualification of the person, who is ordered to be absorbed vis-a-vis the post which is vacant. The person, who is declared surplus and who is ordered to be absorbed, must fulfill the requisite qualification for imparting education in the said subject or must fulfill the requisite criteria and qualification for discharging the work in case if he belongs to the category of non-teaching staff. DEO, while directing absorption of teacher on non-teaching post, is required to consider as to whether such teacher holds basic qualification for such non-teaching staff

or not. Therefore, if the DEO has not considered the qualification of the person, who is ordered to be absorbed, and the qualification of the person required for filling up of the vacancy, the order would be beyond the scope and ambit of power under Clause 64.3 of the Code. Similarly, on a true and correct interpretation of Clause-64.3 of the Code, it appears that the DEO, while considering the question for directing absorption in the school, should also ensure that the quality of education in the said school is not put to jeopardy or is not damaged. It may be that in `A' school, the standard of other teachers may be high and as a result thereof, the school may be gaining the reputation where good education is being provided and, therefore, the school or the management may be reluctant in absorbing a teacher, who may not be upto the mark or upto the standard of the school. The aforesaid does not mean that the school for extraneous considerations, declines to absorb the teachers or gets any right to refuse absorptions, but, at the same time, it will be the duty of the DEO to consider the said aspects while taking decision for ordering absorption. Similarly, nothing prevents the DEO from giving some choice to the school if more than one surplus teacher or surplus staff is available for absorption. If only one teacher is available, then school has no option but to absorb such teacher but if there is more than one teacher in such subject as surplus, then if such a choice is given to the management, it would encourage a good atmosphere and would rather subserve the intention with which Clause-64.3 is inserted in the Code, and would also be in the interest of atmosphere of the school and also the relations between the management and the person concerned, who is ordered to be absorbed. There cannot be any exhaustive list for dealing with various contingencies, but, it may be individual action of the DEO, which may fail or which may be bad, if such

aforesaid considerations are not taken into account and in a mechanical manner or with some extraneous considerations, the order for absorption is passed. Therefore, while considering the individual case for examining the order of the DEO, the matter will have to be considered accordingly and if the DEO fails to consider the said aspects, it will be for the Director of Education to issue suitable guidelines for regulating the exercise of power by the DEO as per Clause-64.3 of the Code.

***21**. There is no substance in the contention raised on behalf of the petitioners that they will not accept the absorption of surplus teacher, but, they must be allowed to make appointment by a fresh recruitment and, therefore, No Objection Certificate is wrongly denied by the DEO. If a vacancy is there in a school and if the Government has to bear the burden of the salary of such staff and accordingly, grant-in-aid is claimed on such vacant post, it would be unfair on the part of the management or the school to claim that it must be given liberty to make fresh recruitment. As observed earlier, the action would not be reasonable if those who are experienced or duly selected teachers or staff are to be terminated on account of non-availability of work and fresh appointments are to be permitted on the ground that work is available. As such, the schools, which are receiving grant-in-aid, in all, can be said to be in one block so far as the policy of the Government is concerned because ultimately, the burden of salary, even after declaration of surplus teacher, is to be borne by the State. As observed earlier, if the State, in the larger interest, has formulated the policy of absorption of surplus teacher in a school where there are vacancies, such an action cannot be said to be unreasonable or arbitrary. On the contrary, the contention of the petitioners that they would insist for fresh appointment or fresh recruitment of new*

staff and will not absorb the experienced staff, who came to be appointed by regular selection process, lacks bona fides. If the petitioners are desirous to assert their rights as per Section-35 of the Act for appointment of the staff by the Committee, nothing prevents the petitioners to declare that they will not claim any grant for the whole of the school or in any case for such new post and they will bear the burden for running the institution or in any case for such new post. But, if the burden is to be thrown and to be based over to the State or public exchequer and if the grant-in-aid is to be claimed over the fresh recruits of teaching or non-teaching staff, the Government and the authority will be justified in declining No Objection Certificate so long as all surplus teachers or staff is not accommodated in all the schools, which are receiving the grant-in-aid or the schools, which are running at the cost of the Government and where there are vacancies available of such teaching or non-teaching staff as the case may be.

***22**. Similarly, if the clause is inserted in the Code, which, as per the observations of the Court made hereinabove, is found to be reasonable and valid, and if on one hand the Government is compelled to pay the salary of surplus staff and on the other hand, the institution is not acting as per Clause-64.3 of the Code, the authority will be justified in withholding the grant-in-aid on the ground that the institution has failed to observe and comply with the terms and conditions of the Code. If the institutions receiving the grant-in-aid are allowed to create a situation whereby the Government is compelled to pay the salary to the surplus staff without taking work and the Government is saddled with the additional financial responsibility of new staff by recruitment, the same, in my view, would be against the public interest and would result into wastage of public money and also*

> *public time, and therefore, such a challenge on the part of the petitioners that the DEO has no power to withhold the grant-in-aid if the order for absorption is not complied with cannot be sustained and deserves to be rejected*."

(14) According to Mr.B.S. Patel, learned advocate appearing as an intervener, the aforesaid judgment in case of *Atladara Kelavani Mandal & Ors*. (supra) did not take into consideration the relevant paragraphs of the judgment of the Apex Court in the case of T.M.A. Pai Foundation (supra) with special reference to Paragraph Nos.71 and 72, because, according to Mr.Patel, attention of the Court was not invited thereto. This submission was made in light of the subsequent decision of the Apex Court rendered in case of *Brahmo Samaj Education Society & Ors. Vs. State of W.B. & Ors.*, (2004) 6 SCC 224.

(15) It is incorrect to state that the Court has not considered the judgment cited. However, without entering into any further discussion to appreciate the contention Paragraph Nos.71, 72 and 73 of the judgment in case of T.M.A. Pai Foundation Vs. State of Karnataka may be reproduced as under:

"Private Aided Professional Institutions (non-minority)

71. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State. The merit may be determined either through a common entrance test conducted by the University or the Government followed by counselling, or on the basis of an entrance test conducted by individual institutions - the method to be followed is for the university or the government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the government or the university to provide that consideration should be shown to the weaker sections of the society.

72. Once aid is granted to a private professional educational institution, the government or the State agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The State, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the State. The State would also be under an obligation to protect the interest of the teaching and non-teaching staff. In many States, there are various statutory provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue expenditure including salary, pay and allowances of teaching and non-teaching staff. It would be its responsibility to ensure

that the teachers working in those institutions are governed by proper service conditions. The State, in the case of such aided institutions, has ample power to regulate the method of selection and appointment of teachers are prescribing requisite qualifications for the same. Ever since In Re, Kerala Education Bill, 1957 this Court has upheld, in the case of aided institutions, those regulations that served the interests of students and teachers. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institutions. In other words, rules and regulations that promote good administration and prevent maladministration can be formulated so as to promote the efficiency of teachers, discipline and fairness in administration and to preserve harmony among affiliated institutions. At the same time it has to be ensured that even an aided institution does not become a government-owned and controlled institution. Normally, the aid that is granted is relatable to the pay and allowances of the teaching staff. In addition, the Management of the private aided institutions has to incur revenue and capital expenses. Such aided institutions cannot obtain that extent of autonomy in relation to management and administration as would be available to a private unaided institution, but at the same time, it cannot also be treated as an educational institution departmentally run by government or as a wholly owned and controlled government institution and interfere with Constitution of the governing bodies or thrusting the staff without reference to Management.

Other Aided Institutions

73. There are a large number of educational institutions, like schools and non-professional colleges, which cannot operate without the

> *support of aid from the State. Although these institutions may have been established by philanthropists or other public-spirited persons, it becomes necessary, in order to provide inexpensive education to the students, to seek aid from the state. In such cases, as those of the professional aided institutions referred to hereinabove, the Government would be entitled to make regulations relating to the terms and conditions of employment of the teaching and non-teaching staff whenever the aid for the posts is given by the State as well as admission procedures. Such rules and regulations can also provide for the reasons and the manner in which a teacher or any other member of the staff can be removed. In other words, the autonomy of a private aided institution would be less than that of an unaided institution*."

(16) In the case of Brahmo Samaj Education Society & Ors. (supra) the controversy arose in context of the procedure laid down by the West Bengal Government under the provisions of the West Bengal College Teachers (Security of Service) Act, 1975 and the West Bengal College Service Commission Act, 1978 as well as the West Bengal College Service Commission (Manner of Selection of Persons for Appointment to the Posts of Teachers Including Principals) Regulations, 1980. The controversy was whether the State of West Bengal in the circumstances, could regulate the appointment through the College Service

Commission. The Apex Court, after considering the contentions raised by both the sides, did not render any final opinion but observed thus:

> "10. When a larger Bench consisting of eleven Judges of this Court in T. M. A. Pai has declared what the law on the matter is, we do not want to dilute the effect of the same by analysing various statements made therein or indulge in any dissection of the principles underlying it. We would rather state that the State Government shall take note of the declarations of law made by this court in this regard and make suitable amendments to their laws, rules and regulations to bring them in conformity with the principles set out therein.
>
> 11. In this view of the matter, it is unnecessary to examine whether the present rules are valid or not. Until such time as such rules are framed in terms of the order made by us now, the interim orders made by this Court in these proceedings will be operative."

(17) Thus, the issue whether the State Government can or cannot issue such circulars by way of resolutions is no longer *res integra*. In fact, while dealing with resolution dated 21.05.1994 this Court in the case of Chairman, Dhareshwar Sarvajanik Kelvani Trust & Anr. (supra) has categorically stated that a grant-in-aid school is required to follow the directives under the said resolution dated 21.05.1994. It has further been recorded that there is no fresh appointment

under Section 35(1) of the Act. In fact if one goes by the provisions of Section 35 of the Act the said section provides for recruitment of the teaching staff and recruitment of the headmaster. The formation of the specified committees under Section 35(2) and under Section 35(3) of the Act is for the purposes of recruitment and only after the committees select a suitable person from amongst the recruits that the question of appointment arises. Therefore, to state that when the DEO calls upon the school management to absorb a teacher rendered surplus it takes away the right of appointment, including the process of selection, cannot be accepted for the simple reason that the process of recruitment and selection qua the teacher rendered surplus has already taken place once. To state that the same was by a different committees and hence, not binding on a particular different management cannot be accepted for the simple reason that the constitution of the committee, whether by management 'A' or management 'B' is in terms of the statutory requirement provided under Section 35 of the Act.

(18) The only question that would survive is to what extent the State Government is entitled to put fetters on the freedom in the matter of administration and management of a school considering that the school avails of grant viz. financial assistance, given by the State. In the case of *T.M.A. Pai Foundation* (supra) the Apex Court has categorically stated that the State, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the State. The State would also be under an obligation to protect the interest of the teaching and non-teaching staff. It has further been laid down by the Apex Court that the autonomy of a private aided institution would be less than that of an unaided institution. However, at the same time it is not open to the government to treat an educational institution as if it is departmentally run by the government or as a wholly owned and controlled government institution. As a natural corollary, it is not open to the State Government to interfere with the constitution of the

governing bodies or thrusting the staff without reference to the managements.

(19) In light of the aforesaid principles enunciated by the Apex Court in the case of T.M.A. Pai Foundation (supra) in the case of *Brahmo* Samaj Education Society & Ors. (supra) the Apex Court itself did not think if fit to opine on the validity of the Rules framed by the Government of State of West Bengal and left it open to the wisdom of the State Government to frame rules and regulations in accordance with what has been laid down in the case of *T.M.A. Pai Foundation* (supra).

(20) In the circumstances, while upholding the contention on behalf of the respondents that the impugned government resolutions set out the policy decision of the State Government and the Court should not interfere with the same, it is necessary at the same time to ensure that while implementing the policy the State Government or its representatives, or the Secondary Education Board and/or its officers do not go beyond the permissible limits. It is necessary to direct the State Government to ensure that while

implementing the policy not only necessary rules and regulations are framed, but even the framing of the policy may be revisited for the reasons that follow hereinafter.

(21) As already noted hereinbefore both the circulars in the form of resolutions record that the said resolutions have been framed after consultation and deliberation with the representatives of the Secondary Teachers' Federation, but the managements of the school, who are responsible to administer and manage the school which includes the teaching staff, have never been consulted during the decision making process. The grievances ventilated on behalf of the school management to an extent are well-founded. As noted by this Court in the case of *Atladara Kelavani Mandal & Ors*. (supra) a teacher who is declared surplus and who is directed to be absorbed is required to possess requisite qualification for imparting education in the subject for which a vacancy exists in a particular school. In other words, the respondent authorities are duty bound to ensure that a square peg is not hammered in a round hole.

(22) The government, in the circumstances, can hold deliberations with the managements of the school to reformulate the policy after including the view point of the school managements and incorporate such guidelines as may be necessary to ensure that while absorbing the surplus teachers, as far as possible the school managements must have an option to choose a teacher for the vacancy that exists out of the panel of teachers, declared to be surplus, available with the office of the DEO; and in the event, a teacher declared to be surplus is not proficient in the subject for which a vacancy exists, there should be a procedure laid down to ensure that such a teacher, if available from the neighbouring district is considered for the job. However, it is necessary to make it clear that the option to select a competent teacher does not carry a right to reject outright the direction to absorb a teacher rendered surplus.

(23) In the circumstances, the respondent authorities, including the State, are directed to frame a suitable policy after bearing in mind what is stated hereinbefore. It would be advisable that such policy is

framed as part of the Regulations and/or Rules instead of by way of circulars.

(24) It is made clear that till the State Government formulates a fresh policy, no precipitate action shall be initiated by the respondent authorities qua the petitioners like withdrawal or deduction of grant amount, subject to the petitioner-management being ready and willing to accept the allotted teachers. It is also made clear that till the point of time the State Government formulates the new policy the respective DEO's shall permit informal consultation to the school-management before directing absorption of a surplus teacher so as to ensure that there is no unwarranted litigation.

(25) Subject to what is stated hereinbefore, the petitions are allowed to the aforesaid extent. RULE made absolute accordingly. There shall be no order as to costs.

(26) Registry to place a copy of this order in connected matters. A copy of this judgment shall be forwarded

to the Secretary, Department of Education, Government of Gujarat

Sd/-
[D.A. MEHTA, J]

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Bhavesh*